NO. 12,599

In the United States Court of Appeals for the Ninth Circuit

JAMES MARTIN MACINNIS, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

JURISDICTIONAL STATEMENT

The United States District Court for the Northern District of California had jurisdiction over the appellant and power to punish him summarily for contempt committed in the presence of the Court under Section 401, Title 18, United States Code and Rule 42(a), Federal Rules of Criminal Procedure.

The statutory provisions and the rules involved are as follows:

Chapter 21 of Title 18, United States Code, provides:
§ 401. Power of Court.

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42, Federal Rules of Criminal Procedure, provides:

Rule 42. Criminal Contempt.

(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the Court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) *Disposition Upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission

to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

The judgment appealed from was entered on April 4, 1950 (R. 71-73), and the notice of appeal was filed on April 12, 1950 (R. 74-75). The jurisdiction of this Court rests on Section 1291 of the Judicial Code (U.S.C., Title 28, § 1291). See also Rule 37(a), Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

This is an appeal from an order entered on April 4, 1950 in the United States District Court for the Northern District of California, sentencing appellant to three months' imprisonment (R. 71-73, 87), upon his conviction by summary judgment on February 2, 1950 (Supp. R. 100-101) of misbehavior committed in the actual presence of the presiding judge on February 1, 1950, in violation of § 401, Title 18, U.S.C. (R. 33-34). Pursuant to Rule 42(a), Federal Rules of Criminal Procedure, an order and certificate reciting the facts constituting the misbehavior and certifying that the same was committed in the presence of the presiding judge during a session of the United States District Court for the Northern District of California, were signed by United States District Judge George B. Harris, issued on February 28, 1950 and entered of record in said Court on March 1, 1950 (R. 2-4). Notice of appeal from the order of April 4, 1950 was filed by appellant on April 12, 1950 (R. 74-75).

SUMMARY OF THE FACTS

Appellant MacInnis was counsel for defendants Schmidt and Robertson in the case of United States v. Harry R. Bridges, et al. (R. 74), the trial of which action began on November 14, 1949 before Judge George B. Harris in the United States District Court for the Northern District of California, and ended on April 4, 1950. Vincent Hallinan, Esquire, was counsel for the defendant Bridges in this case. The charges against the three defendants were, in substance, that the defendant Bridges had committed perjury in testifying in a naturalization case that he was not and had not been a member of the Communist Party, that the other two defendants had aided and abetted him in the commission of such perjury and that the three had conspired to have the defendant Bridges defraud the Government of the United States by committing such perjury (Br. 8-9).[1] On November 22, 1949, eight days after the trial of the *Bridges* case started, Vincent Hallinan, Esquire, was adjudged guilty of misbehavior in the presence of the Court, for which he was sentenced by Judge Harris to six months' imprisonment (R. 83, Br. 36). That judgment was affirmed by this Court in *Hallinan* v. *United States,* 182 F. 2d 880. Following this conviction, Mr. Hallinan committed further acts for which he was adjudged guilty of contempt at the end of the Bridges trial and sentenced to serve an additional six months' imprisonment, the second sentence being ordered to run concurrently with the first (R. 83-84).

On February 1, 1950, Father Paul Meinecke was called by the defense in the *Bridges* case to testify as a character witness in behalf of defendant Bridges and was interrogated on direct examination by appellant

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[1] Opening Brief of Appellant

MacInnis (R. 4-5). The witness in substance testified, among other things, that he was a duly ordained priest in the Roman Catholic Church and had been such for the past twenty years (R. 5); that during the decade beginning about 1936-37 he was stationed at San Francisco, California (R. 5-6); that in this period he became interested in the labor movement and was instrumental in organizing in San Francisco the Association of Catholic Trade Unionists (R-7); that after ten years experience in the trade union movement in San Francisco he was transferred to a sparsely settled region of Nevada where there were no labor unions (R. 6, 26); and, that this transfer was made at his request (R. 27).

After completion of the direct and cross examination by counsel for the defense and the prosecution, the Court interrogated the witness, in the course of which Father Meinecke in substance testified, among other things, that he was appearing in court pursuant to subpoena; that he arrived in San Farncisco the previous evening at which time he met appellant MacInnis and had dinner at MacInnis' home (R. 31); that during the evening he discussed the *Bridges* case with appellant; that he rarely sees a newspaper and that he asked appellant to refresh his recollection as to the date on which he first met Bridges (R. 32); that while stationed in San Francisco he was well oriented with respect to time, but that since being stationed in Nevada the "* * * years have sort of run together. I say a couple of years ago, and then I remember back, it was 15 years ago." (R. 33). The trial judge then inquired: "Have you been recently subjected to medical treatment, Father?" (R. 33), after which the following colloquy occurred (R. 33-34):

> Mr. Hallinan: If the Court please, I am going to object to these questions.

Mr. MacInnis: Let me in.

Mr. Hallinan: I want to enter a legal objection. Your Honor has seen the Manning Johnsons, the Crouches, the Rosses and everybody get on that stand and we asked whether they were insane or not. I object to your Honor's question. I object to that last question and assign that as misconduct, and I ask that the jury be instructed to ignore the implication of the question.

The Court: There is no occasion for any admonition to the jury. Mr. MacInnis invited it.

Mr. MacInnis: I never heard of such a question.

The Court: Mr. MacInnis invited me to ask the question.

Mr. MacInnis: Your Honor refused to do that and I asked a question.

The Court: I have the greatest respect for men of the cloth, as we all have.

Mr. MacInnis: You are demonstrating it.

The Court: There is no impropriety in my questioning.

Mr. MacInnis: I say there is.

The Court: He asserted his present memory is not good. I asked him whether or not his recollection was good while he was here years ago. He said yes, it was good years ago. I don't see any reason for the criticism.

Mr. MacInnis: When one of the prosecution witnesses was on the stand we asked him if he had received medical treatment, and now you ask a priest who comes here and gives testimony the same question.

The Court: Ladies and gentlemen—

Mr. MacInnis: I think you should cite yourself for misconduct.

The Court: Ladies and gentlemen—

Mr. MacInnis: I never heard anything like that. You ought to be ashamed of yourself.

At the prosecution's request, acquiesced in by appellant MacInnis, the witness remained over until the following day, February 2, 1950, on which date his testimony was completed (R. 36-70). After the conclusion of Father Meinecke's testimony on February 2, 1950, Judge Harris in the course of the following colloquy orally adjudged appellant MacInnis guilty of contempt of Court for his described conduct of the preceding day, committed in the presence of the trial judge, and informed appellant MacInnis that he would thereafter file a certificate and an order pursuant to Rule 42 of the Federal Rules of Criminal Procedure but would defer sentence until a later date in the trial (Supp. R. 100-101):

> And I might say, Mr. MacInnis, that in reading the transcript, I concluded that the proper administration of justice and maintenance of respect due the courts require me to certify that yesterday you committed conduct in the actual presence of this Court constituting contempt.
>
> Mr. MacInnis: Before your Honor finds—
>
> Mr. Hallinan: Might I represent Mr. MacInnis in this before you say anything further?
>
> The Court: And I say for the record, that the Court, in [4977] the proper exercise of its function, propounded a relative and pertinent question to the witness, Father Paul Meinecke, whereupon Mr. MacInnis addressed the Court as follows:
>
> "I think you should cite yourself for misconduct. I have never heard anything like that. You ought to be ashamed of yourself."

That appears at transcript page 4796. I say to you, Mr. MacInnis—

Mr. Hallinan: Your Honor, might I be heard on that before—

The Court: I say to you, Mr. MacInnis, that this Court will file a certificate and an order pursuant to Rule 42 of the Rules of Criminal Procedure.

Mr. Hallinan: Your Honor, may I be heard?

The Court: One moment, Mr. Hallinan.

Mr. Hallinan: I have never heard such a — Why can't I be heard in the matter?

The Court: And making such order and fixing such punishment will be deferred. I will defer the punishment to later, to a later date in the trial.

Mr. Hallinan: Very well.

The Court: We will now stand adjourned until tomorrow morning at 10:00 o'clock.

Subsequently, while the Bridges trial was still in progress, Judge Harris on February 28, 1950 issued an order on contempt as to appellant MacInnis, filed March 1, 1950, the text of which order reads as follows (R. 2):

ORDER ON CONTEMPT

On the first day of February, 1950, the defendant appeared in person.

It is adjudged that the defendant is guilty of contempt of court for misconduct during the judicial proceeding in United States v. Harry Renton Bridges, Henry Schmidt and J. R. Robertson, No. 32117-H, as specified in the accompanying certificate.

It is ordered that the defendant appear before this Court for sentence upon the termination and

conclusion of the trial stages in United States v. Harry Renton Bridges, Henry Schmidt, and J. R. Robertson, No. 32117-H.

It is further ordered that the Clerk deliver a certified copy of this Order on Contempt and the accompanying certificate to the United States Marshal or other qualified officer.

Certified this 28th day of February, 1950, at San Francisco, California.

/s/ George B. Harris
United States District Judge

Also on February 28, 1950, Judge Harris issued a certificate on contempt in conformity with Rule 42(a) of the Federal Rules of Criminal Procedure, entered of record March 1, 1950, reading as follows (R. 3-4):

Certificate in Conformity With Rule 42(a)
Federal Rules of Criminal Procedure

In conformity with Rule 42(a), Federal Rules of Criminal Procedure, I hereby certify that the conduct for which the defendant is punished for criminal contempt was committed in my presence and was seen and heard by me during a session of the United States District Court for the Northern District of California, Southern Division, under the following circumstances:

On the morning of Wednesday, February 1, 1950, following the examination by counsel for defendant and counsel for the Government, of the witness, Father Paul Meinecke, the Court had occasion to interrogate the witness. After propounding several questions, the Court asked a proper and pertinent question, directed toward the physical well-being of the witness, to wit:

Q. Have you been recently subjected to medical treatment, Father?

(Tr. p. 4794, lines 20-21.)

Following such question, Mr. MacInnis jumped to his feet, participated in a critical remonstrance of the Court, at the conclusion of which he stated to the Court in a belligerent manner in the presence of the jury, to wit:

Mr. MacInnis: I think you should cite yourself for misconduct.

The Court: Ladies and gentlemen—

Mr. MacInnis: I have never heard anything like that. You ought to be ashamed of yourself.

(Tr. p. 4796, lines 2-6.)

The entire record of the testimony of Father Paul Meinecke, designated Exhibit A, is attached hereto, and is made a part of this Certificate.

Certified this 28th day of February, 1950, at San Francisco, California.

/s/ George B. Harris
United States District Judge

As indicated in the text, there was attached to and made a part of the foregoing certificate a complete transcript of the testimony of Father Paul Meinecke and the proceedings which occurred during his testimony (R. 4-70).

Immediately following the return of the verdict in the *Bridges* case on April 4, 1950, the Court issued its judgment that appellant be sentenced to three months' imprisonment (R. 71-73, 87,) from which order the present appeal is being prosecuted (R. 74-75; Br. 5).

SUMMARY OF THE ARGUMENT

I. Appellant, as an attorney, was an officer of the Court, and owed an unusually high duty to assist in maintaining the Court's authority and dignity. The abusive language used by appellant in addressing the presiding judge in the presence of the jury during the trial of the *Bridges* case, considered in conjunction with his belligerent demeanor, implied an unmistakable purpose to flout the authority and dignity of the Court and amply supported the Court's adjudication of contempt.

II. It is strenuously contended that the presiding judge's conduct and rulings were proper, but even if erroneous, appellant had the adequate remedy of appeal and was not thereby licensed belligerently to assail the authority and dignity of the Court and bring it into public disrepute.

III. Jurisdiction to punish summarily for contempt committed in the Court's presence, without notice or hearing, attaches at the time the offense is committed, and such jurisdiction is not lost by the Court's postponing to a more propitious time the exercise of its summary power, especially if the period of postponement is not unreasonable and does not operate to the substantial prejudice of the contemnor. The Court should exercise its summary power with circumspection, having due regard contemporaneously to the vindication of the dignity and authority of the Court, its protection from further contempt, and the preservation of all parties and officers before the Court from unnecessary prejudice or injury. Under the circumstances of the instant case it was proper for the Court on the day following appellant's misbehavior to adjudge him in contempt, and to postpone the filing of the formal order and certificate and the imposition of sentence until a later date in the trial.

IV. In fixing sentence for contempt committed by an attorney in the presence of the Court during the trial of a case, the presiding judge may properly take into consideration the contemnor's general conduct in the case as bearing upon the intent with which the offense was committed and as mitigating or aggravating the penalty. The sentence assessed by the presiding judge, who is in best position to determine a proper punishment, will not be disturbed on appeal in the absence of a gross and palpable abuse of discretion.

ARGUMENT

I.

Appellant's Conduct Was Misbehavior Within the Meaning of § 401 of Title 18, U.S.C.

Pursuant to the provisions of 18 U.S.C. § 401 and in conformity with Rule 42(a), Federal Rules of Criminal Procedure, United States District Judge George B. Harris certified that in the presence of the Court appellant MacInnis, defense counsel in a criminal case then on trial, jumped to his feet and participated in a critical remonstrance of the Court over a proper question which the Court had directed to a defense witness, and that appellant concluded his remonstrance by stating to the Court in a belligerent manner and in the presence of the jury (R. 3-4):

> Mr. MacInnis: I think you should cite yourself for misconduct.
>
> The Court: Ladies and gentlemen—
>
> Mr. MacInnis: I have never heard anything like that. You ought to be ashamed of yourself.

In appraising appellant's behavior as described in the Court's certificate, consideration should be given not only to the language used by appellant but also to Judge Harris' description of appellant's contemptuous

demeanor, i.e., that he "jumped to his feet, participated in a critical remonstrance of the Court" and that he addressed himself to the Court "in a belligerent manner in the presence of the jury." Appellant does not dispute this finding. The written record can not adequately describe the atmosphere prevailing in the courtroom during the turbulent proceedings involved, and the judge's characterization of appellant's bearing is entitled to great weight upon a review of the propriety of the trial court's adjudication of contempt. *Fisher* v. *Pace,* 336 U.S. 155, 161; *Ex parte Robinson,* 86 U.S. 505, 511; *Hallinan* v. *United States,* 182 F. 2d 880, 887, 888 (C.A. 9); *United States* v. *Green,* 176 F. 2d 169, 172 (C.A. 2).

Inexcusable in a layman, the behavior in question on the part of an attorney engaged in the trial of a case was gross contumely. As an officer of the court, an attorney is under a higher duty than the ordinary citizen to uphold the dignity of the court and to conduct himself with propriety while engaged in his professional activities at the bar. *Hallinan* v. *United States,* 182 F. 2d 880, 888 (C.A. 9); *In re Maury,* 205 F. 626, 629 (C.A. 9); *United States* v. *Ford,* 9 F. 2d 990, 992 (D.C. Mont.); *United States* v. *Anonymous,* 21 F. 761, 771, (D.C. Tenn.).

The insolent language used by appellant MacInnis in addressing the presiding judge, coupled with appellant's belligerent manner, unquestionably implied a purpose to flout the authority and dignity of the Court and to intimidate it in its administration of the law. Appellant admits that in his behavior, "every *appearance* of contempt is present." (Br. 10). Appellate courts consistently have held such conduct to be contemptuous and have affirmed the right of the trial judge summarily to punish such contempts. *Fisher* v. *Pace,* 336 U.S. 155; *Ex parte Terry,* 128 U.S. 289; *Hal-*

linan v. *United States, supra; In re Maury, supra; United States* v. *Sacher,* 182 F. 2d 416 (C.A. 2); *United States* v. *Hall,* 176 F. 2d 163 (C.A. 2); *United States* v. *Green,* 176 F. 2d 169 (C.A. 2); *United States* v. *Bollenbach,* 125 F. 2d 458 (C.A. 2); *United States* v. *Landes,* 97 F. 2d 378 (C.A. 2). In fact, the Court observed in the *Bollenbach case, supra,* at page 460, "* * * the judge would have been unfit for his office if he had not made use of those sanctions which the statute gave him."

II.

There Was No Excusable Justification for Appellant's Misbehavior.

After admitting that in his reported behavior, "every *appearance* of contempt of Court is present," appellant proceeds to devote the bulk of his brief to a reiteration and amplification of his original contemptuous remarks, claiming legal excuse for the contempt on the ground that as defense counsel it was his duty, in the face of the presiding judge's alleged prejudicial treatment of his clients, to reprove the Court in forceful and unmistakable language and, in the jury's presence, to charge that the Court should have been ashamed of itself and should have cited itself for misconduct (Br. 10-55).

By a tortuous process of specious reasoning, including strained interpretations of events occurring after the commission of the contempt, hypercritical definitions of the meanings of some of the words and phrases used by the trial judge, inferences based upon inferences, and claimed innuendo hidden in the Court's innocent language, appellant purports to construct a factual basis for his charge that the presiding judge was prejudiced against the defendants in the *Bridges* case and sought to secure their convictions (Br. 10-55). Appellant asserts that in asking the witness Meinecke if

he had been recently subjected to medical treatment, the presiding judge was in fact trying to assist the prosecution and jeopardize the defense of the case by making it appear to the jury that this witness to the good reputation of Bridges had been mentally ill and was unreliable (Br. 10-38). Appellant claims that partially because of this alleged ulterior motive of the Court, and also because the question was improper under previous rulings of the trial judge, appellant was justified in rebuking the Court in the manner described (Br. 38-43). However, appellant goes on to state that the principal reason for his behavior was his duty as an attorney to protect his client from the consequences of the Court's alleged false statement in the jury's presence that the appellant invited the Court to ask the question relating to the witness' health (Br. 43-55).

It is not necessary on this appeal to defend the presiding judge's conduct in the Bridges trial against the attacks of appellant MacInnis. While it is strenuously asserted that Judge Harris' conduct toward the defendants on trial and toward their counsel was eminently tolerant, fair and impartial, that conduct is a matter for review by this Court upon an appeal on the merits in the *Bridges* case. The propriety of appellant's behavior, not that of the Court, is now the issue.

It may be pointed out, however, that if Judge Harris had desired to destroy the effect of Father Meinecke's testimony, which appears to have been incompetent, it was not necessary for him to resort to the abstruse process of innuendo and veiled suggestion attributed to him by appellant. He could have done so quickly, directly and more certainly by granting the Government's motion to strike the witness' testimony from the record and instructing the jury to disregard it. Instead, however, demonstrating a liberal attitude toward the reception of evidence offered in behalf of

defendants, Judge Harris overruled the motion and allowed the testimony to stand (Supp. Tr. 97-100).

It is of course conceded that appellant had the duty, in an orderly manner, to employ before the Court every legitimate argument and tactic at his command which he thought might serve his clients' interests. But it was not in his clients' interests and it was not legitimate for him belligerently to remonstrate with the Court over its actions and publicly to accuse it of official malfeasance.

In his capacity as advocate for the defendants Robertson and Schmidt, appellant MacInnis did not appear before Judge Harris on the trial of the *Bridges* case as a matter of right—he was in court as a matter of license, conditioned upon his compliance with the requirements of the Bench and Bar. He should have been aware that fidelity to the Court, of which he is an officer, was his paramount obligation and that no duty to his clients could have justified his flagrant contempt of the authority and dignity of the Court. *United States* v. *Ford,* 9 F. 2d 990, 992, (D.C. Mont.) ; Cooley, *Constitutional Limitations,* Eighth Edition, at page 708.

In *Hallinan* v. *United States,* 182 F. 2d 880 (C.A. 9), this Court affirmed the contempt judgment against appellant's associate counsel in the *Bridges* case, and stated at pages 886 and 888:

> Appellant argues that the opening statement he was making could not have been curtailed without endangering the defense. We see no force to this argument. The ruling of the Court should have been complied with. The record was sufficiently definite to have permitted a review by an appellate court of the question of whether the opening statement had been unduly limited. *Sunderland*

v. *United States,* 8 Cir., 1927, 19 F. 2d 202, 208, 210-211.

* * * * * *

An officer of a court has a higher duty to assist in maintaining the dignity and integrity of courts than does the ordinary citizen. True, every lawyer, if he is worthy of the name, must use every legitimate effort in support of his client and in so doing will be relieved from an improper contempt judgment. *Caldwell* v. *United States,* 9 Cir., 1928, 28 F. 2d 684. No such condition exists here. The record reflects quite the contrary. From cases cited in the briefs we learn that appellant has on two occasions been held in contempt of a State court.

In *United States* v. *Sacher,* 182 F. 2d 416, 430 (C.A. 2), the attorneys for various defendants on trial for conspiring to advocate the overthrow of the Government by force and violence were summarily punished for contempt when the trial was finished. In affirming the action of the presiding judge, the Appellate Court said:

The chief defense which appellants make for their obstructive tacts and impudent charges is that the judge provoked them by making what they consider indefensible rulings in the case. The validity of these rulings is not before us on this appeal. But it must borne in mind that when counsel differ as to the rulings of a judge, they acquire no privilege to charge him with bad faith and misconduct, and to obstruct the trial. Their only remedy is by an appeal.

United States v. *Landes,* 97 F. 2d 378, 380 (C.C.A. 2), is further authority for the proposition that counsel should assist in maintaining the dignity of the Court

and "should never try to injure its authority or attempt defiance thereof."

Likewise, appellant's contention that the Court's question to the witness Meinecke was legally improper under prior rulings of the presiding judge can not excuse his misbehavior. Objection to the question was made which sufficiently preserved the Court's action for review (R. 33). Appellant's dissatisfaction with this adequate legal remedy can not justify his subsequent venomous tirade against the Court.

In *Fisher* v. *Pace,* 336 U.S. 155, the Supreme Court of the United States, at page 162, quoted with approval the following excerpt from the opinion of the Supreme Court of Texas in *Ex parte Fisher,* 146 Tex. 328, 335, 206 S.W. 2d 1000, 1005:

> It was the duty and power of the trial judge in the trial of the compensation suit to determine the type, manner and character of the argument before the jury. Of course his rulings thereon were subject to review in the appellate courts, but he has the power to make them whether right or wrong. If they are erroneous the injured party has the plain, simple and adequate remedy of appeal. It was thus the duty of counsel to abide by his decisions even if erroneous; and if any rights of his clients were violated the remedy was by exception and appeal. Any other procedure would result in mockery of our trial courts and would destroy every concept of orderly process in the administration of justice.

In *Hallinan* v. *United States, supra,* this Court said at pages 885 and 887:

> If it be true, as appellant maintains, that the matters which he proposed to prove were entirely

proper as a defense, his remedy was on appeal, not to wilfully disregard the rulings of the Court. *United States* v. *Bollenbach,* 2 Cir., 1942, 125 F. 2d 458.

* * * * * *

All practitioners know that in the trial of cases courts and lawyers often disagree as to the admissibility of evidence. It is further generally recognized that the trial court has the duty of determining the question of admissibility for the time being at least and that when the Court has spoken, upon counsel is then imposed the duty of abiding by that ruling. The error, if any, is to be corrected elsewhere.

This general rule is too well established to merit further discussion. It seems obvious from the authorities cited that the presiding judge's conduct and rulings in the case on trial, erroneous or not, can not excuse this appellant's belligerent flouting of the authority and dignity of the Court.

III.

The Court Had, and Properly Used, Summary Power to Adjudge Appellant Guilty of Misbehavior in Its Presence and to Punish Him for the Offense.

Appellant contends that under the "due process" clauses of the Constitution and Rule 42, Federal Rules of Criminal Procedure, the power of the presiding judge to impose summary punishment for misbehavior committed in his presence is limited to contempts which actually obstruct, or tend to obstruct, the orderly process of the Court and which require immediate disposition to prevent the demoralization of the Court's authority before the public. Appellant argues that since there was no need for summary disposition of the

subject conduct, as indicated by the Court's failure to take immediate action and by its failure to certify that the conduct had any obstructive qualities or tendencies, the Court either never acquired jurisdiction to punish him summarily, or else lost such jurisdiction before sentence was imposed (Br. 56-71).

In support of his contentions appellant relies upon dicta of the Supreme Court in *In re Oliver,* 333 U.S. 257, 275; *Cooke* v. *United States,* 267 U.S. 517, 534-35; and Justice Holmes' dissenting opinion in *Toledo Newspaper Co.* v. *United States,* 247 U.S. 402, 423 (Br. 56-71). These cases, which were considered and distinguished in *United States* v. *Sacher,* infra, did not involve contempts committed in the presence of the presiding judge or questions of procedure analogous to those in the subject appeal. Essentially, appellant's arguments amount to nothing more than a protest over the provisions of existing law which invest the Federal court with power summarily, and without notice or hearing, to punish for misbehavior committed in its presence.

Inherent in the capacity of Courts to function at all is their power to enforce decorum in judicial proceedings, to compel submission to their orders, and summarily to punish the defiant and contumelious for misbehavior in the Court's presence. It is well established that the exercise of such summary powers by the Court accords due process of law to the contemnor. The Supreme Court recently had occasion to reaffirm this universally conceded doctrine in *Fisher* v. *Pace,* 336 U.S. 155, 159-160.

Section 401 of Title 18. U.S.C., provides that the Court shall have power to punish such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
(2) Misbehavior of any of its officers in their official transactions;
(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

It is apparent that Subdivision 1 of this section authorizes the Court to punish two types of contempt, (a) misbehavior of any person occurring within its sight or hearing and as to which it has direct personal knowledge, or (b) misbehavior of any person outside its immediate presence and as to which it does not have personal knowledge, but which is sufficiently near the Court as to obstruct the administration of justice. (See *Savin, Petitioner,* 131 U.S. 267 at 277).

Reasserting the long conceded power of federal courts to proceed summarily against contempts in their presence, Rule 42(a), Federal Rules of Criminal Procedure, provides:

(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the Court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

Criminal Rule 42(b) provides for the disposition upon notice and hearing of criminal contempts not occurring in the Court's presence.

It seems beyond question that appellant's challenged conduct was misbehavior in the presence of the Court within the meaning of 18 U.S.C., § 401(1) and that,

under Rule 42(a), Federal Rules of Criminal Procedure, the Court had jurisdiction to punish appellant summarily without notice or hearing. In view of the fact that appellant's offense falls within the first category of 18 U.S.C. § 401(1), described above, and that he was convicted of such offense (Supp. R. 100-101), it was necessary in the order of contempt under Rule 42(a) for the judge only to recite the facts constituting the misbehavior and certify that it was committed within his actual presence. This was done. A further certification under the second category of the offense defined in § 401(1), that the contempt obstructed the orderly process of the Court, was unnecessary, although it is apparent that the appellant's conduct not only did obstruct the administration of justice, but also violated § 401(2) proscribing "misbehavior of any of its officers in their official transactions."

Although the Court adjudged appellant in contempt on the day following his acts of misbehavior, appellant MacInnis completely ignores this fact and argues that Judge Harris lost jurisdiction to dispose summarily of the misconduct because he waited until twenty-eight days later in the Bridges trial before performing the ministerial act of filing the formal order and certificate required by Criminal Rule 42(a) and waited until the end of the trial, sixty-two days later, before imposing punishment (Br. 57-69). Having been adjudged in contempt, no right of appellant was prejudiced by the fact that the Court awaited a propitious time to complete the disposition of the offense. At the time he was found guilty, appellant was told by Judge Harris that the filing of the formal order and certificate and the imposition of sentence would be deferred (Supp. R. 100-101). This procedure was thoroughly reasonable and proper.

In *Ex parte Terry,* 128 U.S. 289, summary punish-

ment for contempt in the presence of the Court was imposed on the same day, but some time after the offense was committed. In rejecting the petitioner's contention that the trial court lost jurisdiction to punish him summarily by delaying the exercise of its powers, the Supreme Court said at page 311:

> In our judgment this question must be answered in the negative. Jurisdiction of the person of the petitioner attached instantly upon the contempt being committed in the presence of the court. That jurisdiction was neither surrendered nor lost by delay on the part of the circuit court in exercising its power to proceed, without notice and proof, and upon its own view of what occurred, to immediate punishment.

The Supreme Court in the *Terry* case left open as not necessary to its decision the question of whether or not the presiding judge would have retained jurisdiction to punish summarily for the contempt on a later day in the same term, or in a subsequent term. However, this Court, in *In re Maury,* 205 F. 626 (C.A. 9), construed the *Terry* case as authorizing a trial Court summarily to adjudge an offender guilty of a contempt in its presence on the day after its commission. It said at page 632:

> We are of opinion that the rule laid down in the case of Terry is entirely applicable to the case before this Court. Obviously there can be no distinction between delaying until later in the same day, and delaying until the next day, before making an order adjudging an offender guilty of contempt of court; jurisdiction of the person of the offender having attached instantly upon the contempt being committed in the presence of the court.

This Court again ruled on this question in *Hallinan* v. *United States,* 182 F. 2d 880, 887 (C.A. 9), where it succinctly stated, in affirming the conviction of appellant's associate counsel for contempt in the presence of Judge Harris:

> It is said that the Court lost jurisdiction to proceed under Rule 42(a) by waiting from the adjournment of court on the evening of November 21, 1949 until 9:30 a.m. of November 22, 1949, before pronouncing the judgment of contempt. We do not agree. *In re Maury,* 9 Cir., 1913, 205 F. 626; *United States* v. *Sacher,* 2 Cir., 1950, 182 F. 2d 416.

Then, after quoting Rule 42(a), the Court continued:

> We think the word "summarily" does not require hasty determination and that the night hours spent by the judge in preparing his summation for his contempt order, delivered on the following morning, are not an improper incident to summary action.

In appraising the propriety of the trial judge's procedure in the subject case, consideration should be given to the difficult environment in which the contempt was committed. Attention is directed to Judge Harris' observation that from the beginning of the Bridges trial appellant MacInnis and his associate, Vincent Hallinan, Esquire, "embarked upon a course of conduct designed and calculated to contemptuously provoke the Court in the hope that such provocation would lead the Court to commit error or plunge the case into a mistrial." (R. 82.) Eight days after the trial started, attorney Hallinan was summarily sentenced to imprisonment for contempt of Court, but at the request of defendant Harry Bridges, execution of

the sentence was stayed until the termination of the trial and Mr. Hallinan was permitted to continue as counsel in the case (R. 83). Within a comparatively brief period thereafter, Mr. Hallinan committed additional acts of misbehavior for which he was again sentenced at the end of the Bridges trial (R. 83-84).

It was in this setting that appellant MacInnis committed the acts of misconduct now under consideration. In the circumstances, Judge Harris was obviously anxious to avoid hasty action which might endanger the defense of the Bridges case or interfere with its conduct. By permitting himself the evening to consider the matter of appellant's contempt, in detachment from the tension of the courtroom, Judge Harris had an opportunity to decide upon the best course of action to vindicate the authority and dignity of the Court and yet avoid unnecessarily arbitrary or oppressive conclusions upon the parties to the case on trial. Judge Harris accomplished this result by summarily adjudging appellant MacInnis guilty of contempt the following day, and suspending the imposition of sentence until the termination of the Bridges trial.

It was obviously to the advantage of appellant and his clients that sentence be not imposed upon him immediately after he launched his belligerent attack upon the Court. Punishment imposed in the direct wake of this tirade might have been much more severe than that actually imposed after the Court had given itself a "cooling off" period; punishment imposed immediately might have created an impression on the jury unfavorable to appellant and his clients; and punishment imposed during trial would probably have required appellant to interrupt his efforts in behalf of his clients in order to prosecute his own appeal.

The rights of appellant and the summary jurisdiction of the Court were in no way affected by the fact

that, after orally adjudging appellant guilty of misbehavior in his presence, Judge Harris awaited a more convenient time in the trial to file the formal order and certificate on contempt. Appellant does not show that he was prejudiced by this postponement. At the time of the oral judgment, appellant was told those documents would be filed later (Supp. R. 100-101).

A similar question arose in *United States* v. *Hall,* 176 F. 2d 163, 168 (C.A. 2), where formal orders and certificates on contempt were filed eight days after summary punishment was imposed. In approving this action of the presiding judge, the Appellate Court said:

> He could probably have formally adjudged the appellants in contempt sooner than he did and filed the formal orders and certificates sooner, but that is quite beside the point because the few days delay did not legally prejudice them. Before their appeals were taken the original oral remands had been superseded by the formal orders and the filing of the certificates, all of which, and not the original orders alone, now form the basis for their sentences.

Likewise, the legitimate rights of appellant and the summary jurisdiction of the Court were not affected by the fact that sentence was not imposed upon him until after the conclusion of the Bridges trial. The record does not indicate that appellant sought an earlier sentence. He shows no prejudice from this postponement.

In *United States* v. *Sacher,* 182 F. 2d 416 (C.A. 2), the attorneys for some of the defendants in a criminal case were summarily punished for misbehavior committed in the Court's presence during the course of a ten months' trial. The adjudications of contempt, the

filing of orders and certificates, and the imposition of sentences all followed upon the return of verdict in the main case, in some instances months or weeks after the acts of misbehavior occurred. In rejecting the attorneys' contention that the presiding judge had no jurisdiction at the end of the trial to punish them summarily for contempts committed during its progress, the Court said at page 429:

> The conclusion we have reached in overruling the appellant's second objection is borne out by a decision of the Ninth Circuit [*In re Maury,* 205 F. 626] and by several decisions in the state courts where summary punishment for contempt was imposed under statutes similar to the one governing the case at bar. They are all to the general effect that the punishment should follow the acts of contempt with reasonable promptitude, but that the degree of promptitude depends upon the particular facts of each case, and that the punishment need not follow immediately if such an imposition would endanger the defense in a criminal case, or interfere with its conduct. [citing *Middlebrook* v. *State,* 43 Conn. 257, 21 Am. Rep. 650; *In re Cary,* 165 Minn. 203, 206 N. W. 402; *In re Willis,* 94 Wash. 180, 162 P. 38].

Other cases in harmony with the Government's position on this point are *O'Malley* v. *United States,* 128 F. 2d 676, 684 (C.A. 8), reversed on another ground, sub nom. *Pendergast* v. *United States,* 317 U.S. 412; *In re Presentment by Grand Jury of Ellison,* 44 F. Supp. 375 (D.C. Del.); *In re Grossman,* 109 Cal. App. 625, 631-632, 293 Pac. 683, 685-686; *Albano* v. *Commonwealth,* 315 Mass. 531, 532-535, 53 N.E. 2d 690, 691-692; and *In re Cary,* 165 Minn. 203, 206 N.W. 402.

It is submitted that, under the circumstances of this case, the Court properly exercised its summary powers to punish appellant for his gross misbehavior.

IV.

The Sentence Was Properly Imposed and Was Not Excessive.

Appellant contends that in fixing sentence the Court was improperly influenced by unspecified acts of alleged misconduct committed by him during the trial, but for which he was not adjudged in contempt, and that the sentence was therefore excessive (Br. 64-67).

Appellant apparently bases his contention on the observation by Judge Harris, just prior to the imposition of sentence, that it was manifest that from the beginning of the trial defense counsel had "embarked upon a course of conduct designed and calculated to contemptuously provoke the Court in the hope that such provocation would lead the Court to commit error or plunge the case into a mistrial." (R. 82.) What that conduct was, whether it consisted of acts, or the failure to act, of gestures, words, inflections of the voice, or what, is not specified. But, whatever it was, the conduct occurred in Judge Harris' presence, was observed by him, gave emphasis to the intent with which appellant committed his contempt, and was properly taken into consideration by the Court in fixing sentence. *Sullivan* v. *Ashe,* 302 U.S. 51; *State* v. *Noble,* 55 F. 2d 227 (C.A. 4); *Bailey* v. *United States*, 284 F. 126, 127 (C.A. 7); *Peterson* v. *United States,* 246 F. 118 (C.A. 4).

The case of *Cooke* v. *United States,* 267 U.S. 517, relied upon by appellant as supporting his contention, is not in point because there the contemnor was summarily punished for an offense not committed in the presence of the Court and which should have been prosecuted upon notice and hearing. In assessing punishment the presiding judge improperly gave considera-

tion to other specific acts which did not occur in the Court's presence, which Cooke was not permitted to deny or explain, and of which the Court had no legitimate knowledge.

The contempt statute, 18 U.S.C. § 401, does not limit the amount of "fine or imprisonment" which may be assessed against a contemnor, but leaves the extent of the punishment to the sound discretion of the Court. Appellate courts consistently have held that the trial judge is in best position to fix a proper penalty for contempt in his presence, and that the sentence imposed by him will not be reviewed or disturbed in the absence of a showing of gross and palpable abuse of discretion. *Ex parte Terry,* 128 U.S. 289, 309-310; *Hallinan* v. *United States,* 182 F. 2d 880, 887-888 (C.A. 9); *In re Maury,* 205 F. 626, 632 (C.A. 9).

In any event, however, appellant has no ground for complaint here since it does not appear that the Court's consideration of counsel's general demeanor during the trial aggravated the appellant's punishment. After pronouncing sentence, the Court stated to appellant (R. 87):

> Although, in my opinion, Mr. MacInnis' contemptuous conduct was just as studied and flagrant as that of Mr. Hallinan, nevertheless I feel he is entitled to a lesser sentence, for the reason that he appears to have been, to some extent at least, inspired by his senior colleague, Mr. Hallinan.

We believe the following language in *Sachs* v. *Government* of the Canal Zone, 176 F. 2d 293, 300 (C.A. 5), cert. den. 338 U.S. 858, used in affirming a sentence for criminal libel, is singularly applicable to appellant's entire brief in the subject case.

In his attack upon the sentence, as distinguished from the conviction, the brief carries forward the same bitterness of attack, the same venom and anger, against the District Attorney. It does not put forward, as mitigating the offense, that appellant was acting in the heat of anger. He made no effort below, he makes none here, to apologize for his libelous charges or to explain them away on this ground. He made the attack in bitterness and resentment. He has continued it the same way. Complaining here of the sentence as unduly severe and asking its correction, he does not do so as an erring person convinced of his error and bringing forth fruits meet for repentance, but in anger and resentment. His brief states that he is a college graduate, a naval veteran, and that he has no previous record of crime. These facts show that he is not an underprivileged, illiterate and misled person, offending through ignorance, but a thoroughly informed one, who has knowingly offended and repents not. They make against him rather than for him when, with a vigorous determination to fight the matter out to the end in self-righteousness and as an accuser, he demands a reduction of his sentence instead of confessing his guilt and suing in repentance for a mitigation of its punishment.

CONCLUSION

We respectfully submit that the judgment of the District Court should be affirmed.

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